IN THE HIGH COURT OF BOMBAY AT GOA
****

FIRST APPEAL NO. 97 OF 1997

1. Smt. Havabi Xec,
   wife of late Xec Haider,

2. Shri Salim Xec,

3. Smt. Nasimbi Xec, all
   major of age, all r/o
   Canca, Verla, Bardez, Goa,
   represented herein by
   their duly constituted
   attorney Shri Shaikh Jamir,
   major, r/o Valpoi, Goa, and

4. Kamruddin alias Javed Xec,
   minor, through his next
   friend, the appellant no.1,
   Smt. Havabi Xec, mother of
   the said minor. ... Appellants.

Versus

1. Shri Yakub Aga, major
   of age, r/o Nanuz,
   Valpoi, Sattari,
   Goa,

2. Shri Kalidas V. Parab,
   advocate, r/o Bicholim,
   Goa,

3. Shri Abdul Gafar Khan,
   Rahim Khan, alias Pathan
   Rahim Khan,

4. Smt. Sakinabi Abdul
   Gafar, alias Pathan,

5. Smt. Nairumbi alias
   Mehrunnissabi Mutalik
   Khan,

7. Smt. Habibai Syed Ahmad,
   alias Babli Shaikh Usman,

8. Smt. Salimbi Noroddin
   Khan, alias Paizubbi
   Noroddin Khan,

9. Noroddin Khan,

10. Abdul Mutalik Khan,
all major, r/o Nanuz,
Valpoi, Goa 403 506,

11. Shri Abdul Kadar alias
Nasir Khan, major,
r/o Canca, Verla,
Bardez, Goa,

12. Smt. Afisabi Xec, and

13. Shri Iqgal Xec,
both major of age, r/o
Canca, Verla, Bardez, Goa. ... Respondents.

Shri J. P. Mulgaokar, Advocate for the appellants.

Shri S. Vahidulla, advocate for respondent no. 1.

CORAM : S. A. BOBDE, J.

DATE : 17th June, 2004

ORAL JUDGMENT

This First Appeal is by an unsuccessful plaintiff who prayed for a declaration that the Judgment, Order and Decree dated 11th October, 1982, passed in Regular Civil Suit No.26/75 be declared null and void. He has also sought a permanent injunction to restrain the defendants therein from executing decree dated 11th October, 1982, passed in the said Civil Suit and further for an eviction of the defendant no.1 from the said plot ad measuring 30 x 30 mts. of the suit property; and for possession thereof. The parties are referred as per their status in the Civil Suit.

2. The plaintiff Xec Haider, since deceased and survived by his legal representatives' case is that he is the son of the late Xec Abdul and his wife Apizambi Khan @ Apizambi Can, who in turn was the daughter of the late Fote

Can and Solimabi Can. Apizambi Can expired on 12th January, 1951.

3. The suit property known as "Cosmachi Gal" situated at Nanuz, Sattari Taluka, belonged to his grandfather Fote Can According to the plaintiff, the property has not been partitioned after the death of his grandparents and is common and undivided till today.

4. The late Fote Can and Solimabi had a son, namely Rahim Can, brother of Apizambi. On 30th August, 1956, Rahim Can sold a plot of the suit property measuring 30 x 30 mts. to the defendant no.1 Yakub Aga. Since the property was not duly conveyed to Yakub Aga, the defendant no.1 filed Regular Civil Suit No.26/75 in the court of the Civil Judge, Senior Division, Bicholim, against the said Rahim Can and his wife praying that they be ordered to rectify the said deed dated 30th August, 1956, by purportedly describing the property and give possession of the plot 30 x 30 in front of the house of defendant no.1 to them. While the suit was pending Rahim Can expired and his heirs were brought on record. This suit was decreed by the Judgment and Order dated 11th October, 1982. The defendants i.e. Rahim Can’s heirs were permitted to rectify the sale deed by giving a proper description and give possession of the plot ad measuring 30 x 30 to the said Yakub Aga after demarcating the same.

5. In fact, the plaintiffs admittedly did not take any action from 30th August, 1956, i.e. the date on which Rahim Can is said to have sold the property by registered sale deed to Yakub Aga. They did not take any action even after Yakub Aga's suit was decreed against Rahim Can, who was ordered to give possession of the property. Apparently, after Yakub Aga levied execution against the legal representatives of Rahim Can for executing the decree passed in Regular Civil Suit No. 26/75, the plaintiff claims to have come to know of it and filed the suit sometime in the first week of September, 1988.

6. According to the plaintiff, since he was not a party to the Regular Civil Suit, the decree passed therein is null and void and not binding on him.

7. Admittedly, after the present suit was filed the decree in Regular Civil Suit No.26/75 has been executed and possession has been delivered in accordance with the decree to the defendant no.1, Yakub Aga.

8. This suit was resisted by the defendant no.1, inter alia, on the ground that the plaintiff has no locus to ask for a declaration of the decree and that the suit suffers from non-joinder of proper and necessary parties as the parties in Regular Civil Suit No.26/75 were all necessary parties to the suit. The defendants contended that the

Judgment in Regular Civil Suit No.26/75 has been confirmed by the High Court in Second Appeal and the attempts to stall the execution were also overruled by the Executing Court. Several other contentions were also advanced by the defendant. The trial Court framed the following issues and answered them accordingly:-

	ISSUES	FINDINGS
1.	Whether the plaintiff proves that he is entitled for a decree to declare the decre passed in Regular suit no.26/75 is null and void?	No.
2.	Whether the defendant no.1 proves that the suit is hit under section 47 of C.P.C. and hence liable to be dismissed?	No.
3.	What relief? What Orders?	As per Order below

9. The plaintiff himself did not enter the witness box. The deposition on his behalf was given by his power of attorney one Shaik Zamir from whose evidence it appears that he came to know of the sale of the property to the defendant no.1 in 1956 itself by hearsay. The trial Court took into account the fact that the suit is grossly delayed in view of the fact that no action was brought by the plaintiff for having the sale deed dated 30th August, 1956, declared null and void and has approached the Court for a declaration that the decree dated 11th October, 1982 is null and void, after a

period of about 32 years of the execution of the sale deed. The suit was filed in 1988. The trial Court, on appreciation of the evidence, disbelieved the plaintiff as to the time when he first came to know of the Judgment in Regular Civil Suit no.26/75. In fact, the trial Court rendered a categorical finding that the plaintiff's attorney was well aware of the execution proceedings when they were filed and came to the conclusion that the suit ought to fail on the ground of limitation. More importantly, the trial Court, and in my view rightly, came to the conclusion that even if the present suit were to be allowed, it would not give the plaintiff the desired results, since there was no challenged to the sale deed by which Rahim Can conveyed the property to the defendant Yakub Aga. It is important to bear in mind the fact that Regular Civil Suit No.26/75 was brought by Yakub Aga merely for rectification and for delivery of possession. Thus even if the decree in that suit were to be set aside, it would not, ipso facto, result in annulling the sale deed dated 30th August, 1956 in favour of the defendant no.1. In fact, before the present suit was filed there seems to be no dispute that the sale deed also stood rectified. Even otherwise, the trial Court found that half of the suit property was gifted to Rahim Can by his father, the late Fote Can and, therefore, the former had a right to the said house gifted to him. The trial Court observed that the legal representatives of Rahim Can who were joined as parties to the suit did not appear before it and thus no one clarified the circumstances and the capacity

in which Rahim Can sold the suit plot measuring 30 x 30 mts.

10. Shri Mulgaokar, learned counsel for the appellants, submitted that the suit ought to have been allowed by the trial Court in view of the fact that Rahim Can had no right, title or interest to sell the suit property to Yakub Aga. However, I find that this fact has not been proved by the plaintiff. In fact, the constituted attorney of the plaintiff states, in his examination-in-chief, that half of the suit property was in fact gifted to Rahim Can by his father, the late Fote Can. The contention of the learned counsel for the plaintiff cannot be, therefore, accepted, nor can any fault be found with the trial Court for rendering the finding it has.

11. Moreover, I am in complete agreement with the finding of the trial Court that the decree, if passed in favour of the plaintiff, would be inefficacious since the plaintiff had admittedly not sought for setting aside of the sale deed by which the property was conveyed by Rahim Can to the defendant Yakub Aga. In the circumstances of the case, I find no merit in this Appeal, which is hereby dismissed with costs.

S. A. BOBDE, J.

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